

From: [Snyder, Joan](#)
To: [Lori Cora/R10/USEPA/US@EPA](#)
Cc: [Hamilton, Jessica](#); [Krista I. Koehl \(krista.koehl@portofportland.com\)](#); [Craig, Barbara](#); [James Scott Kincaid Esq. \(jkincaid@cablehouston.com\)](#)
Subject: RE: Portland Harbor--EPA's comments on Mitigation Determination Approach
Date: 05/03/2011 01:28 PM

Thanks, Lori. We were charged with calling to get some clarification on some overarching points before the LWG consultants dive into EPA's comments. So recognizing these are just the thoughts of this small group, here goes:

1. With respect to the relation of the draft biological assessment to the FS, at least this group agrees it doesn't have to be part of the FS and we recognize that it is not something EPA will be approving; rather, it is a tool for EPA to use in writing the final BA and a starting point for its consideration as it consults with NMFS. So we are thinking we will just submit it under separate cover and call it a "Draft Biological Assessment." The FS will, however, base its cost assumptions on the conclusions from the draft BA. Is that consistent with what you are thinking?

2. We are a little confused by some comments on the framework for the draft 404(b)(1) analysis that seem to be contrary to the 2008 rules revisions that appeared in EPA and USACE Final Rule on Compensatory Mitigation for Losses of Aquatic Resources, 33 CFR Part 325 and 332, and 40 CFR Part 230. We were working under the assumption that those regulations are governing ARARs (in fact Sean Sheldrake has communicated to the Port that they are ARARs for T-4). Is that the correct assumption? For example, specific comment 19 asks why we would discuss mitigation banking. 40 CFR Part 230(b) addresses the type and location of compensatory mitigation for 404(b)(1) purposes, and mitigation banking (if available) is amongst the types that the regulations direct be considered. We are trying to ensure our draft 404(b)(1) analysis is consistent with those rules. Are we missing some reason why they would not apply?

3. We wanted to make sure we understand EPA's sensitivity to using the word "programmatic" in describing the approach for the draft BA, so that we can respond appropriately. This relates to a very important agreement from our meeting back in July--that the draft BA would evaluate components of the remedial alternatives in a way that would do two things:

(1) provide EPA a "menu" from which it can extract the components it needs for its final BA once it settles on its preferred remedial alternative. Because it is EPA and not the LWG that ultimately chooses a preferred alternative, the LWG cannot write a draft BA to specifically support the selected alternative. The LWG, however, can provide an analysis of component parts of the alternatives in a way that EPA would then more easily be able to craft its BA for its selected remedial alternative.

(2) As we discussed extensively at the July meeting, for purposes of expediting the individual remedial actions, it is really important that the BA, and NMFS's Biological Opinion, be sufficiently comprehensive so that the individual consultations can where appropriate utilize the analyses already performed - being "tiered" to the overall consultation. You will recall that we agreed that it will likely be only the simplest actions that could proceed without a full, separate formal consultation, but that there could be some. We also discussed that, even if the separate actions require full consultations, those consultations could use the analyses performed for the overall consultation, therefore narrowing the scope and decreasing the time required for the individual consultations.

We thought this was a very important resolution in our July meeting. We are puzzled by some of EPA's comments on this, so we wanted to explore with you a little more about the basis for the comments. If there is a reason not to describe this as "programmatic" or "tiering" we would be open to that, but we still think the basic approach is very important.

So, generally, those are our initial, big-picture questions. Let us know when you could be available to talk.

Thanks very much.

Joan P. Snyder
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-----Original Message-----

From: Cora.Lori@epamail.epa.gov [mailto:Cora.Lori@epamail.epa.gov]
Sent: Tuesday, May 03, 2011 8:26 AM
To: Snyder, Joan
Cc: Hamilton, Jessica; Krista I. Koehl (krista.koehl@portofportland.com)
Subject: Re: Portland Harbor--EPA's comments on Mitigation Determination Approach

Hi, Joan. I was out of the office yesterday. I am in the remainder of the week. However, before discussing our comments on the Mitigation Approach, I would like to get your main questions/comments by email so I can think about them before talking.

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